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IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-8 2

JAMES BRADLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF FLORIDA FIRST DISTRICT

DAN R. WARREN
Post Office Box 2265
Daytona Beach, Florida 32015
Attorney for Petitioner

Washington, D.C. • THIEL PRESS • (202) 393-0625

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

JAMES BRADLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF FLORIDA FIRST DISTRICT

Petitioner, James Bradley, prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of the State of Florida, First District, entered in the above captioned case on August 17, 1972, petition for rehearing thereafter denied on October 17, 1972.

OPINION BELOW

The trial Court, the Felony Court of Record for Volusia County, State of Florida, entered a judgment on the 11th day of June, A.D., 1971, printed herein at page

1, Appendix A. The Appellant Court of the State of Florida, First District, rendered its judgment affirming the Trial Court and entered an opinion on August 17, 1972, which is printed herein at pages 1, 2, 3, Appendix B, and is reported at 365 So.2d 532.

Upon petition for rehearing the Appellate Court of Florida, First District, entered an Order denying the same as follows, without further opinion, to-wit:

> "Petition for rehearing and reply thereto having been considered, it is Ordered that the Petition is hereby denied."

on October 17, 1972.

STATEMENT OF JURISDICTION

The Appellate Court of the State of Florida, First District, entered its opinion affirming the Judgment of the trial Court on August 17, 1972. A petition for rehearing was thereafter duly considered by the Court, and denied, without opinion on October 17, 1972.

The Florida Supreme Court is without jurisdiction to consider petitioner's appeal from such adverse decision by reason of the limitations imposed upon it by Florida Appellate Rule 4.5(c)(6), in that the decision of the Florida Appellate Court, First District, does not; (1) effect a class of Constitutional or State officers, or (2) pass upon a question certified by such District Court to be of great public interest, or (3) is in direct conflict with a decision of another District Court of Appeal or of the Supreme Court on the same point of law, so that said decision is a judgment of last resort in the State of Florida. This petition for certiorari is filed within 90 days of the decision of the Court affirming the judgment of the trial Court.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

The Federal questions raised in this appeal are:

POINT I

Does the failure of the Florida Courts to grant to an accused a preliminary hearing, upon demand, after the filing of an information by the Chief Prosecuting Officer of said Court, violate the Fourteenth Amendment dictates of the Constitution of the United States of America which provides that so State shall deprive any person of liberty without due process of law.

POINT II

Does the failure of the Florida Courts to grant to an accused a preliminary hearing, upon demand, after the filing of an information by the Chief Prosecuting Officer of said Court, violate the Fourth Amendment dictates of the Constitution of the United States of America, which provides that "the right of the people to be secure in their persons * * * against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation."

CONSTITUTIONAL AMENDMENTS INVOLVED

Fourth and Fourteenth Amendments of the Constitution of the United States of America, to-wit:

FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

FOURTEENTH AMENDMENT

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE STATUTES INVOLVED

The Florida Statute attempted to be invoked by the Petitioner in his request for a preliminary hearing is Florida Statute 901.06, which provides:

"When the arrest by virtue of a warrant occurs in the County where the alleged offense was committed and where the warrant was issued, the officer making the arrest shall without unnecessary delay take the person arrested before the magistrate who issued the warrant, or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county.

Vol. 23, Fla. St. Ann. Sec. 901.06 at Page 62.

FLORIDA CRIMINAL RULE INVOLVED

Florida Criminal Procedure Rule 1.122, provides as follows:

"Rule 1.122. Preliminary Hearing.

(a) Duty of Magistrate: When the defendant is brought before the magistrate upon an arrest, either with or without a warrant, on a complaint of having committed an offense, the magistrate shall immediately inform him:

1. of the charges against him.
2. of the purpose of the preliminary hearing.
3. of his right to the aid of counsel during the preliminary hearing.
4. of his right to have or to waive such hearing.
5. of his right not to testify, and also caution him that in the event he does testify, anything that he says may be used against him in a subsequent hearing or proceeding."

STATEMENT

The petitioner was charged by direct information, filed by the State Attorney, for the Seventh Judicial Circuit, of Volusia County, Florida, with the alleged criminal offense of Buying, Receiving or Concealing Stolen Property, a felony under the laws of the State of Florida.

The date of the alleged offense was December 15, 1970, and the information was filed January 28, 1971.

No warrant was issued by an impartial magistrate, but seizure of the petitioner was made upon authority of the direct information filed by the Chief Prosecuting Officer of the Felony Court of Record of Volusia County, Florida.

On February 8, 1971, petitioner moved for a preliminary hearing before the Felony Court of Record, claiming a right to a preliminary hearing pursuant to Florida Statute 901.06 and Florida Criminal Procedural Rule 1.122(a)(4), and alleged that a denial to a preliminary hearing violated Defendant's rights granted by the Constitution of the United States.

The petitioner was never taken before a committing magistrate, as requested, but the Felony Court of Record did, on March 20, 1971, arraign defendant upon said charge, enter a plea of not guilty, deny petitioner's motion for preliminary hearing, and set the case for trial two days later, to-wit; March 31, 1971. (R. 6, 18).

The petitioner was tried by jury, and, on April 1, 1971, found guilty, and subsequently sentenced to serve two years in the State Division of Corrections. (R. 291).

The petitioner did, on June 11, 1971, file notice of appeal. (R. 304).

The Appellate Court of Florida, First District, on August 17, 1972, rendered the following decision in the case of *State of Florida v. James Bradley*, 265 So.2d 532, affirming the decision of the trial court:

> "(1) The facts are that the defendant was charged by an information. The Supreme Court of Florida, as well as this court, has held that a probable cause having been found by the filing of an information, the purpose of a preliminary hearing has been met."[1]

---

[1] *Maxwell v. Blount* 250 So.2d 657 (Fla. App. 1st, 1971). *State ex rel Hardy v. Blount*, 261 So.2d 172 (Fla. 1972).

REASONS FOR GRANTING THE WRIT

POINT I

"Does the Failure of the Florida Courts To Grant to an Accused a Preliminary Hearing, Upon Demand, After the Filing of an Information by the Chief Prosecuting Officer of Said Court, Violate the Fourteenth Amendment dictates of the Constitution of the United States of America, Which Provides that No State Shall Deprive Any Person of Liberty Without Due Process of Law."

The primary thrust of the petitioner's claim of an unconstitutional intrusion upon his person as presented within Point I is the Fourteenth Amendment prohibiting against any State depriving a person of liberty without due process of law.

Petitioner claims that the fundamental requisite of due process of law is the opportunity to be heard. In the language of the United States Supreme Court in the case of *Grannis v. Ordean*, 234 U.S. 385; 34 S.Ct. 779 (1914): "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." See also *Armstrong v. Manzo*, 380 U.S. 545, 552; 85 S.Ct. 1187, 1191 (1965).

If a hearing must be given before a driver's license and vehicle registration can be suspended, as was held in the case of *Bell v. Burson*, 91 S.Ct. 1586 (1971), then surely, it would stand to reason that due process demands a preliminary hearing within a reasonable time after an accused has been deprived of his freedom.

If a hearing must be granted before prohibiting the sale of liquor to an individual for one year, as was held in the

case of *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, then, it would appear beyond per adventure that due process demands a preliminary hearing after an individual has been charged with an alleged crime by a partial official of the State of Florida.

If a hearing must be held before termination of welfare payments, even though a subsequent hearing was afforded, as was held in the case of *Goldberg v. Kelly*, 397 U.S. 254; 90 S.Ct. 1011, then it would appear to be fair and just to afford such a hearing to an accused who has been deprived of his liberty by the filing of a direct information.

Why would a hearing be required in an action before wages could be garnished, as was held in *Snidach v. Family Finance Corp.*, 395 U.S. 337; 89 S.Ct. 1120 (1969), if a more fundamental right was guaranteed under the Fourteenth Amendment to a preliminary hearing, but denied to petitioner by the Courts of Florida.

Is it reasonable to hold that an individual is entitled to a hearing before he can be suspended from a public school, as was held in the case of *Williams v. Dade County School Board*, 441 F.2d 299 (5th Cir. 1971), and then deny to an accused a corresponding right to a preliminary hearing under a more fundamental right as guaranteed under the Fourteenth Amendment.

And why would our courts hold that before one could be refused admission to a public hospital, that a hearing must be conducted, as was held in the case of *Sosa v. Board of Managers*, 437 F.2d 173 (5th Cir. 1971), if the Fourteenth Amendment did not incorporate a right to be heard, preliminary, to a trial of an individual upon criminal charges, by the mere filing of an information by a partisan State official.

It has even been held that a hearing must first be held before termination of employment on a college faculty, or so said the Fifth Circuit Court of Appeals, in *Ferguson v. Thomas*, 430 F.2d 852 (1970).

If a hearing is required before depriving an individual of rights afforded to him, it would appear beyond question that due process demands a preliminary hearing.

POINT II

"Does the Failure of the Florida Courts To Grant to an Accused a Preliminary Hearing, Upon Demand, of the Filing of an Information, by the Chief Prosecuting Officer of Said Court, Violate the Fourth Amendment Dictates of the Constitution of the United States of America Which Provides That 'the Right of the People To Be Secure in Their Persons * * * Against Unreasonable Searches and Seizures, Shall Not Be Violated and No Warrants Shall Issue but Upon Probable Cause, Supported by Oath or Affirmation.' "

It is petitioner's contention that Fourth Amendment rights, as outlined above, compel a preliminary hearing in cases where the State elects to prosecute upon direct information filed by its Chief regional prosecuting officer.

How petitioner is arrested, whether upon warrant or search warrant, Fourth Amendment rights attach through the Fourteenth Amendment. See *Giordenello v. U.S.*, 357 U.S. 480; 78 S.Ct. 1245 (1958).

The existence of a Fourth Amendment right to a probable cause hearing has been recognized in two opinions of the Court of Appeals for the District of

Columbia. In *Cooley v. Stone*, 134 U.S. App. D.C. 317; 414 F.2d 1213 (1969), the Court held that a juvenile in the custody of a detention home had the right to a probable cause hearing and cited approvingly the following language of the lower Court:

> "No person can be lawfully held in penal custody by the State without a prompt judicial determination of probable cause. The Fourth Amendment so provides and this Constitutional mandate applies to juveniles as well as to adults." 414 F.2d 1213.

In *Brown v. Fauntleroy*, 442 F.2d 838 (1971), the Court found that the same right applied to a juvenile released pending trial to the custody of his Mother. In that opinion the Court emphasized that the basis of the right was in the Constitution and not in the Federal Rules of Criminal Procedure. Of the fact that the accused was not in physical State custody the Court said:

> "The right to be free of a seizure made without probable cause does not depend upon the character of the subsequent custody. Appellant accordingly has the right to have the validity of the seizure determined since he will be called to trial for conduct which lead to the seizure." 442 F.2d at 842.

Recently the Supreme Court overturned a State Court conviction based upon evidence seized under a search warrant issued by the State Attorney General who was the chief investigator and prosecutor in the case. The warrant was held to be invalid under the Fourth Amendment, as well as the Fourteenth Amendment, because not issued by the "neutral and detached magistrate required under the Constitution." *Coolidge v. New Hampshire*, 400 U.S. 814; 91 S.Ct. 2022 (1971).

CONCLUSION

If a prosecuting official cannot properly issue a search warrant in a case he is prosecuting, then it would appear that he is not a proper person for determining the existence of probable cause to hold an accused for trial.

Respectfully submitted,

DAN R. WARREN
Post Office Box 2265
Daytona Beach, Florida 32015

Counsel for Petitioner

APPENDIX A

JUDGMENT AND SENTENCE OF THE FELONY COURT OF RECORD IN AND FOR VOLUSIA COUNTY, FLORIDA, JUNE 11, 1971

THE STATE OF FLORIDA
vs. CASE NO. 1537
JAMES BRADLEY,
Defendant.

You, James Bradley, having had a fair trial by a jury of your countrymen, and having been found GUILTY of the crime of buying, receiving or concealing stolen property (property of over $100.00 value, a felony) the Court now adjudges you to be GUILTY of that offense. What have you to say why the sentence of the law should not be pronounced upon you? Saying nothing: It is the sentence of the law and such is the judgment of the Court that you, James Bradley, be imprisoned by confinement and committed to the custody of the Division of Corrections for a term of Two (2) years, and the Sheriff of Volusia County, Florida, is hereby ordered and directed to deliver you to the Division of Corrections of the State of Florida, with a copy of this sentence, forthwith.

DONE AND ORDERED in Open Court at DeLand, Volusia County, Florida, this 11th day of June, A.D. 1972.

/s/ Uriel Blount, Jr.
Judge Felony Court of Record

APPENDIX B

OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, AUG. 17, 1972

JAMES BRADLEY, Appellant,	§	
-vs-	§	NO. P-302
STATE OF FLORIDA, Appellee.	§	

District Court of Appeal of Florida,
First District.

August 17, 1972

* * *

JOHNSON, Judge.

This is an appeal from a judgment pursuant to a jury verdict.

The points raised by appellant are (1) does defendant have a right to preliminary hearing * * *

[1] The facts are that the defendant was charged by an information. The Supreme Court of Florida, as well as this Court, has held that a probable cause having been found by the filing of the information, the purpose of a preliminary hearing has been met.[1]

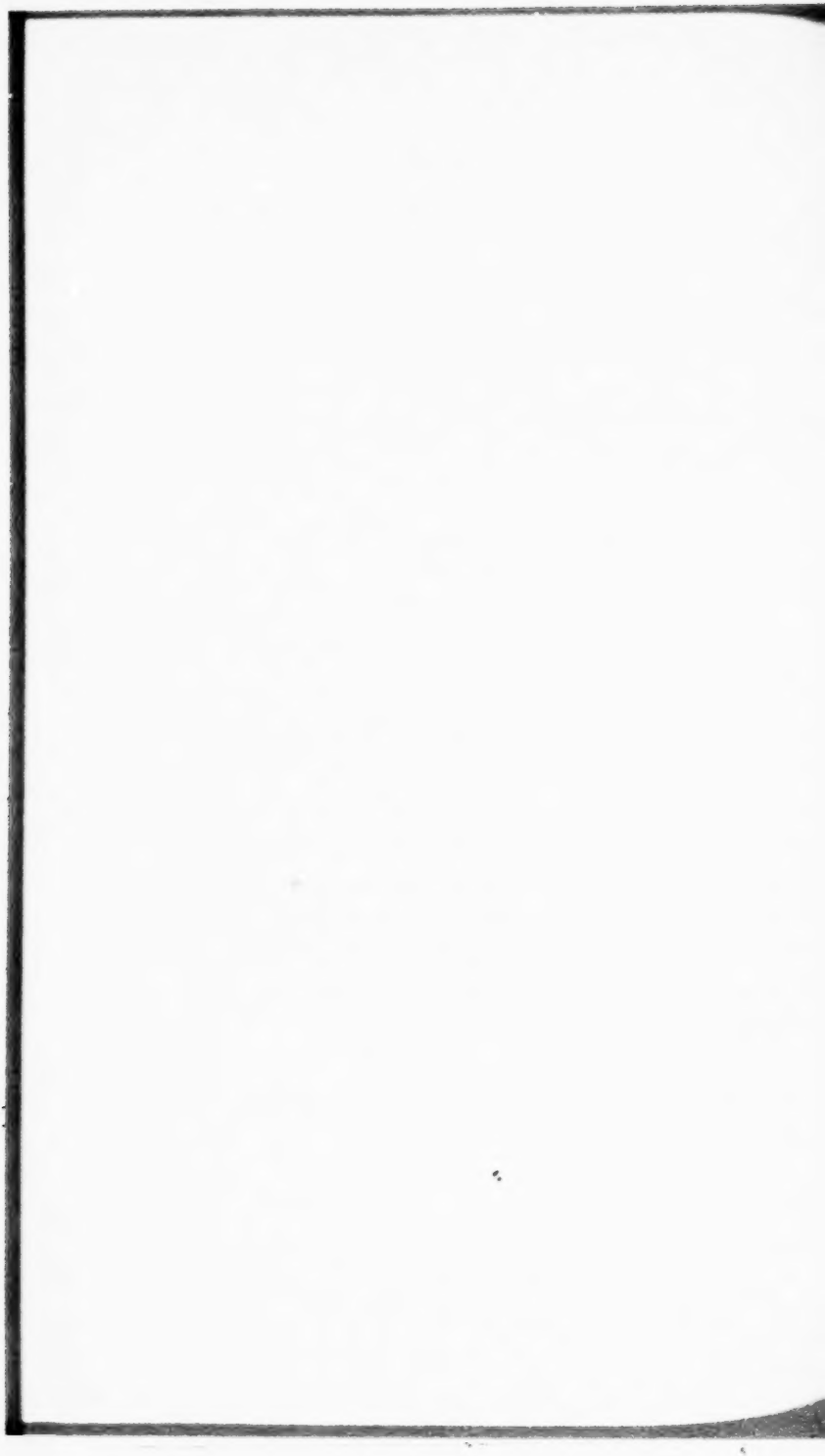
* * *

We see no error in this cause and the judgment and sentence are hereby affirmed.

SPECTOR, C.J., and WIGGINTON, JR., concur

---

[1] *Maxwell v. Blount*, 250 So.2d 657 (Fla. App. 1st, 1971); *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972).



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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A. D. 1972

JAMES BRADLEY,)
Appellant,)
v.) Case No. P-302
STATE OF FLORIDA,)
Appellee.)

ORDER

Petition for Rehearing and Reply thereto having been considered,

IT IS ORDERED that the petition is hereby denied.

WITNESS the Honorable Sam Spector, Chief Judge, and Seal of the Court this 17th day of October, A. D. 1972.

_____
Clerk

FILE COPY

Supreme Court, U. S.
FILED
MAR 15 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-842

JAMES BRADLEY,

PETITIONER,

-VS-

STATE OF FLORIDA,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT L. SHEVIN
Attorney General

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

ATTORNEYS FOR RESPONDENT

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IN THE UNITED STATES SUPREME COURT

No. 72-842

JAMES BRADLEY,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the District Court of Appeal, First District, affirming the judgment and sentence imposed upon Petitioner is reported in 265 So.2d 532, and the citation of 365 So.2d 532 in the petition is undoubtedly a typographical error.

STATEMENT OF THE CASE

On January 28, 1971, a direct information was filed against Petitioner charging him with buying, receiving or concealing stolen property, to-wit: a 1970 Triumph motorcycle. On February 9, 1971, allegedly pursuant to Section 901.06, Florida Statutes, and Rule 1.122 (a)(4), Fla.R.Cr.P., Petitioner filed a Motion for Preliminary Hearing. This motion was denied by the trial judge be-

cause Petitioner was not in custody and had not been in custody at anytime for a period exceeding thirty days.

Trial was held on March 31, 1971, after Petitioner filed a demand for a speedy trial pursuant to Rule 1.191 (Now Rule 3.191, Fla.R.Cr.P.) which required that he be tried within 90 days from the date that he was taken into custody or the information filed. On April 1, 1971, Petitioner was found guilty as charged and on June 11, 1971, judgment and sentence was imposed.

A timely appeal was instituted to the District Court of Appeal, First District, and Petitioner asserted he was improperly denied a preliminary hearing guaranteed to him by Sections 901.06 and 901.23, Florida Statutes, and Rule 1.122, Fla.R. Cr.P., now repealed by rules recently adopted by the Florida Supreme Court. None of the cases cited in the petition nor the constitutional issues now attempted to be raised were raised by Petitioner. Respondent herein answered this contention by directing the District Court's attention to the fact that under existing state law, Section 901.23 did not apply because Petitioner was not arrested with or without warrant, but was arrested on a capias issued pursuant to a direct information and Section 907.45 applied. Section 907.45 provides that a preliminary hearing must be held only if the defendant is "...confined for thirty days after his arrest without trial..." The District Court of Appeal, consistent with state court decisions,

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held the trial judge did not err in denying the Petitioner's Motion for Preliminary Hearing and affirmed the judgment and sentence on August 17, 1972.

Subsequently, Petitioner retained new counsel——counsel who filed the petition herein——and on October 5, 1972, filed a Petition for Rehearing allegedly pursuant to Rule 3.14(a), Fla. App. Rules. Respondent opposed the Petition for Rehearing on the grounds that under Rule 3.14(a), the petition was beyond the 15 days allowed by law and the decision became final on September 1, 1972. The District Court of Appeal, First District denied said petition on October 17, 1972. On December 8, 1972, Petitioner filed in this Court a Petition for Writ of Certiorari to the District Court of Appeal, First District.

JURISDICTION

The jurisdiction of this Court is asserted under 28 U.S.C., § 1257(3).

STATUTES INVOLVED

Section 907.045, Florida Statutes, provides as follows:

> "A defendant who is in custody when an indictment, information, or affidavit on which he can be tried is filed may apply for a writ of habeas corpus attacking the indictment, information, or

affidavit or he may move to dismiss the indictment, information, or affidavit. A defendant who has been confined for thirty days after his arrest without trial shall be allowed a preliminary hearing."

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

It affimatively appears that the decision of the District Court became final on September 1, 1972, as the petition for rehearing was not filed within the fifteen days required by Rule 3.14(a), Florida Appellate Rules. Since that is the case, the time within which a timely Petition for Writ of Certiorari could be filed in this Court——in the absence of an extension of time from the Court——expired on November 30, 1972, and the petition was not filed until December 8, 1972. Accordingly, the petition filed herein is untimely and the same should not be entertained.

II

Even assuming the Court determines it has the authority to consider the petition notwithstanding the deficiency noted under Part I, the petition should be rejected because the issues tendered to this Court were not presented, advanced or decided by the District Court

of Appeal. Not one single case cited by Petitioner's new attorney was presented to the District Court of Appeal! Indeed, original counsel relied upon state statutes and rules together with the case of State ex rel. Shailer v. Booher, Fla.App. 4th 1970, 241 So.2d 720, distinguished by the District Court of Appeal in Maxwell v. Blount, Fla.App.1st 1971, 250 So.2d 657 approved in Hardy v. Blount, Fla. 1972, 261 So.2d 172.

This Court in Cardinale v. Louisiana, 394 U.S. 437 (1969) clearly established that under such circumstances it was without jurisdiction to entertain the merits of the federal claims first raised on appeal in this Court. The Court clearly and unequivocally held:

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L.Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20,

§25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet 368, 391, 9 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e. g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co v. Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v. California, 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v Des Moines, 173 US 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v. City of Memphis, 20 Wall 590, 22 L Ed 429 (1875).

"In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state

courts, 28 USC §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v Ohio, 385 US 92, 17 L Ed 2d 189, 87 S Ct 252 (1966), they should be given the first opportunity to consider them."

For the reasons state above and on the authority of Cardinale v. Louisiana, this Court is without jurisdiction to consider the federal question tendered and/or should not be considered until the matter is properly presented to and passed upon by an appropriate state court.

III

Alternatively, Respondent urges this Court to decline the petition filed herein on the grounds that no substantial federal question is presented by the facts and circumstances of this case.

As has heretofore been noted, the order denying Petitioner's Motion for Preliminary Hearing was predicated on the fact that he was not confined and had not been for any period exceeding thirty days. Accordingly, this case is distinguishable from Pugh v. Rainwater, S.D.Fla. 1972, 332 F.Supp. 1107, 1112, wherein the court was "asked to determine the validity of a present confinement."

In Pugh the district judge noted that this very Court in Lem Woon v. Oregon, 229 U.S. 586 (1914) held an Oregon defendant who was accused by sworn complaint before a committing magistrate had no right to an examination as a condition precedent to the filing of an information by the district attorney, and that the Court of Appeals, Fifth Circuit, has repeatedly held there is no due process right to a preliminary hearing and that "[T]he failure to hold a preliminary hearing, without more, does not amount to a violation of constitutional rights which would vitiate the subsequent conviction." Scarbrough v. Dutton, 393 F.2d 6 (5th Cir. 1968). See also: Murphy v. Beto, 416 F.2d 98 (5th Cir. 1969); McCoy v. Wainwright, 396 F.2d 818 (5th Cir 1968); King v. Dutton, 368 F.2d 57 (5th Cir. 1966); Worts v. Dutton, 393 F.2d 341 (5th Cir. 1968); Kerr v. Dutton, 395 F.2d 79 (5th Cir. 1968); cf. Hamilton v. Alabama, 368 U.S. 52 (1961).

Unlike Pugh, Petitioner did not seek habeas corpus or file an action contesting his existing condition. Rather he raised the matter subsequent to an other-

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wise valid conviction and, whether he was entitled to a preliminary hearing or not, has made no showing whatsoever that the denial of said hearing adversely affected the validity thereof.

Two distinct issues are raised when one questions the authority to hold a person confined without a reasonably prompt hearing to determine if probable cause exists and one challenges the power of the state to prosecute pursuant to a direct information without there first having been a preliminary hearing. The Petitioner is only in a position to raise the latter issue and no substantial federal question is presented with regard thereto. Lem Woon v. Oregon, supra; State v. Hernandez, Fla. 1968, 217 So.2d 109. He is in no position to raise the former and apparently never has been.

CONCLUSION

For the reasons stated hereinabove, Petitioner has not been deprived of due process of law which would result in a vacation of his judgment and sentence, and this Court in the exercise of its discretionary authority should decline to review the same. The petition filed herein should be denied.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded to Honorable Dan R. Warren, Post Office Box 2265, Daytona Beach, Florida 32015, via U. S. Mail, this ____ day of March, 1973.

Raymond L. Marky
Assistant Attorney General

FILE COPY

FILED
MAR 27 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

72-842

JAMES BRADLEY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

REPLY TO THE RESPONSE OF THE RESPONDENT

DAN R. WARREN
Post Office Box 2265
Daytona Beach, Florida 32015
Attorney for Petitioner

• THIEL PRESS •

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REPLY TO THE RESPONSE OF THE RESPONDENT

Comes now the Petitioner, JAMES BRADLEY, by Counsel of Record, and files this his reply brief addressed to arguments first raised in the Response of the Respondent, pursuant to Rule 24(4)(5), of the Supreme Court, and in reply would respond as follows:

ADDITIONAL STATEMENT OF JURISDICTION

1. Without arguing the merits of the question of whether or not the First District Court of Appeals considered Petitioner's Motion for Re-hearing as timely filed, Petitioner asserts to the Court that leave to file a motion for rehearing was filed, and apparently the Appellate Court did consider the motion for rehearing but denied the same on the 17th day of October, A.D., 1972.

In support of Petitioner's claim of timely filing, the Petitioner would respectfully show unto the Court the following facts:

2. The Petition for Certiorari was duly filed with this Court on the 16th day of November, A.D., 1972.

3. A copy of said Petition was duly filed upon Respondent on November 16, 1972, by mail, receipt of which has been acknowledged by the Respondent as received on November 10, 1972.

4. That Petitioner had retained Thiel Press of Washington, D.C., to prepare the printed brief and to file the same with the Supreme Court on or before November 16, 1972.

5. Through inadvertance and misunderstanding between Counsel for Petitioner and Thiel Press, the filing fee of $100.00 was not paid at the time of filing, but was promptly paid upon notice to Counsel for Petitioner by the Clerk of the Supreme Court on December 1, 1972.

6. (a) The facts constituting this inadvertance and misunderstanding are as follows:

(b) The Petitioner, through his attorney of record, on November 10, 1972, by telephonic communication and confirmed by letter of the same date, received assurance from Thiel Press, 1422 "K" Street, N.W., Washington, D.C., that it would print and deliver to the

Supreme Court on or before November 16, 1972, 40 copies of Petitioner's Petition for Writ of Certiorari.

(c) That Counsel for Petitioner had never filed a Petition for Certiorari with the Supreme Court and inquired of Thiel Press as to the filing fee. That Thiel Press advised Mrs. Claire Tillotson, secretary to Counsel of Record, to deposit the sum of $150.00, and Thiel would be responsible for the filing of said Petition and bill Counsel for any overage.

(d) That on November 13, 1972, Counsel mailed Thiel Press a check in the amount of $150.00, as a cost deposit.

(e) On November 21, 1972, Thiel Press mailed its invoice #7154 in the amount of $169.06, which additional sum was promptly paid.

(f) Counsel did not realize that the filing fee had not been paid until notified by the Honorable Edward C. Shade, Assistant to Michael Rodak, Jr., Clerk of the Supreme Court on December 1, 1972.

(g) That Counsel received such notice by mail on Monday, December 4, 1972, and promptly, on the same date, mailed a check in the amount of $100.00 to the Clerk.

(h) Counsel does not suggest that Thiel Press was in any way negligent or breached any agreement with counsel for payment of the filing fee, but merely alleges that the non-timely payment was due to a misunderstanding on Counsel's part as to the manner of payment.

7. Upon receipt of the filing fee, the Petition was docketed on December 8, 1972, by this Court.

The Petitioner contends that the Petition was timely filed with the Court on November 16, 1972.

Petitioner can find no United States Supreme Court case where failure to pay the filing fee is a jurisdictional prerequisite under Rule 22; however, there is ample authority that Rule 22 is not jurisdictional, even as to time. See *Schacht v. United States*, 398 U.S. 58, 26 L.Ed. 2d 44; 90 S.Ct. 1555; also, *Heflin v. United States*, 258 U.S. 415, 3 L.Ed. 2d 407; 79 S.Ct. 451 (1959) and *Taglianetti v. United States*, 394 U.S. 316, 22 L.Ed. 2d 302; 89 S.Ct. 1099 (1969).

The Supreme Court of the State of Florida has held, in the case of *City of Gainesville v. Thomas*, 229 So.2d 833, that:

> "while timely filing of notice of appeal is jurisdictional, the timely deposit of the required filing fee is not."

We respectfully urge the Court to accept the Petition as timely filed.

II.

In response to the position taken by the Respondent under Reason II of its Reply, as to why the Writ should not issue, Counsel for the Petitioner takes issue with the statement that original counsel relied upon State Statutes and rules to support his right to a preliminary hearing.

1. In order for the Court to understand the issues raised by Petitioner, both before the Trial Court and the First District Court of Appeal of Florida, as to his right to a preliminary hearing, it is necessary to review the status of the law of Florida at the time the appeal was filed. Notice of Appeal was filed on June 11, 1971. The direct information charging Petitioner with the felony of buying, receiving or concealing stolen property was filed by the State Attorney for the Seventh Judicial Circuit of

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Florida on January 18, 1971. Petitioner was never taken before a Committing Magistrate for a determination of probable cause, reasonableness of bail, nor to be advised of his Constitutional rights as apparently required by Florida Criminal Procedural Rule 1.222. Florida Statute 902, having been repealed by the Florida State Legislature on January 1, 1971, and superseded by Criminal Procedural Rules adopted by the Florida Supreme Court, which provided that conflicting rules and statutes were suspended. The Preliminary Hearing provision of the Criminal Procedural Rule as to Preliminary Hearings was essentially the same language as the repealed Florida Statute 902.

At the time Petitioner was informed against, by direct information, the right to a Preliminary Hearing after the filing of a direct information and while the defendant was on bail, had not been directly decided by our State Supreme Court.

In attempting to come to legal grips with this right, the Fourth District Court of Appeal of Florida, on December 1, 1970, in the case of *State ex rel Shailer v. Booker*, 241 So.2d 720, the Court recognized the statutory right to a preliminary hearing but did not hold the same to be a procedural step essential to due process of law in State Courts. It suggested that if the right is not voluntarily accorded, a Writ of Mandamus would be the appropriate remedy.

Armed with *Shailer v. Booker*, but dissatisfied with its rejection of the procedural due process right, Petitioner claimed such a right at the trial court level in a pre-trial motion for a preliminary hearing based upon State and Federal Constitutional rights. This Motion upon Federal Constitutional rights was embodied under the 4th and 14th Amendments of the United States Constitution.

In his pre-trial motion for preliminary hearing filed before the trial court on February 8, 1971, the following Constitutional rights were claimed:

"5. That the failure or refusal of the State to grant James Bradley a preliminary hearing violates his rights guaranteed by the Constitution of the State of Florida, and the Constitution of the United States and the law promulgated thereunder, to-wit:

(a) The right to demand the nature and cause of the accusation against him;

(b) The right to meet the witnesses against him face to face;

(c) The right to have compulsory process for the attendance of witnesses on his behalf; all being necessary and required at any preliminary hearing wherein the major issues is probable cause for any accusation;

(d) The right to due process;

(e) The right to be represented by counsel at any and all "critical stages" of the criminal process so that potential substantial prejudice to the Defendant's rights might be avoided;

(f) The right to cross-examination of witnesses to expose any fatal weakness in the State's case that might;

(g) The right to a skilled interrogation of the witnesses which can fashion a fatal impeachment tool for use at the trial;

(h) The right to a more effective discovery technique which allows the Defendant to better prepare his defenses;

(i) The right to reasonable bail;

(j) The right to equal protection of the law.

6. That by virtue of the State's denial to the defendant of his right to a preliminary hearing his arrest is illegal and contrary to the Constitution and laws of the State of Florida, to-wit:

(a) The defendant was denied the right to be brought before a magistrate;

(b) The defendant was denied the right to be informed by a magistrate of the charge against him;

(c) The defendant was denied the right to be informed of his right to counsel by a magistrate;

(d) The defendant was denied his right to be informed of his right to waive the Preliminary Hearing."

To such Constitutional attack, the Trial Court held, on March 31, 1971:

"Ordered and Adjudged that the Defendant's Motion for Preliminary hearing be, and the same is hereby denied."

It is clearly demonstrated by the record that the Trial Court at the first opportunity, was given the right first to consider the applicability of State Criminal Procedural Rules in light of a Federal Constitutional challenge and chose to avoid the issue.

With the undisputed facts in the record, it is difficult to reconcile the respondent's statement to this Court that original Counsel relied upon State Statute and rules to support his claim of a Constitutional right to a preliminary hearing.

We respectfully suggest to the Court that Petitioner bottomed his argument before the Trial Court of a right to a preliminary hearing under the Fourth and Fourteenth Amendments to the Constitution of the United States, as the trial record clearly indicates.

It is interesting to note that the First District Court of Appeal's decision in *State ex rel Hardy v. Blount*, 261 So.2d, 172, decided by the Court on April 5, 1972, at a time prior to oral arguments in *Bradley*, rejected a right to a preliminary hearing based upon State statutory or

Florida Criminal Procedural Rule rights. A Federal Constitutional issue was not advanced in Hardy.

Faced with the Hardy decision, it hardly seems logical that counsel would abandon his Constitutional rights argument and rest his case upon State statutes and rules already decided by Hardy.

Indeed, the briefs and positions taken refuse such claim.

2. As to the Respondent's statement that not one single case cited by Petitioner's new attorney was presented to the District Court of Appeal, Counsel would respectfully show that *Pugh v. Rainwater*, 332 F. Supp. 1107 was cited, which contains the authorities relied upon by counsel in his Petition before this Court. In Pugh, Judge King, Federal Judge of the United States District Court, Southern District of Florida, specifically ruled upon the following Constitutional question:

CONSTITUTIONAL QUESTION

> "The principal Constitutional issue for determination is, of course, whether one who is arrested and held for trial upon an information filed by the state attorney is entitled to a hearing before a judicial officer on the question of probable cause."

The issue framed by counsel for Petitioner in his brief to the First District Court of Appeal under Point A was:

> "Whether or not a person arrested after an information has been filed against him has a right to a preliminary hearing, and if so, how may that right be enforced when the same is not voluntarily accorded to the arrested person."

Judge King answered the question upon Constitutional rights as follows:

"The Court finds under the Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have the Constitutional right to a judicial hearing on the question of probable cause." *Pugh v. Rainwater*, 332 F. Supp. 1107.

The First District Court of Appeal answered essentially the same question as follows:

"The facts are that the Defendant was charged by information. The Supreme Court of Florida, as well as this Court, has held that a probable cause having been found by the filing of the information, the purpose of a preliminary hearing has been met."

In Counsel's brief to the First District Court of Appeal, counsel pointed out Judge King's findings that:

"A preliminary hearing is necessary for direct information cases by the 4th as well as the 14th Amendments to the Constitution of the United States."

3. Indeed, in the Petition for Rehearing before the First District Court of Appeal of Florida, whether timely filed or not, Counsel for Petitioner urged the Court reconsider the following Constitutional question as grounds for granting the same, to-wit:

"That the Appellate Court failed to consider the Constitutional right to a preliminary hearing as embodied under the 4th and 14th Amendments to the Constitution of the United States of America."

In view of the undisputed record of repeated attempts by Petitioner to raise Federal Constitutional rights at the trial and Appellate level, Respondent's claim that such issues are first raised in the Petition are totally without merit.

Ample opportunity was given to the State at the trial and Appellate level to decide the Federal Constitutional issues raised, but for reasons known only to the State, the Trial and Appellate Courts avoided such issues and decided the rights on existing State laws in violation of Petitioner's Federal Constitutional Rights.

CONCLUSION

WHEREFORE, Petitioner respectfully moves this Court to issue its Most Gracious Writ of Certiorari.

Respectfully submitted,

DAN R. WARREN
Post Office Box 2265
Daytona Beach, Florida 32015
Attorney for Petitioner

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Supreme Court, U. S.
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PETITION FOR RE-HEARING

DAN R. WARREN
Post Office Box 2265
Daytona Beach, Florida 32015

Washington, D.C. • THIEL PRESS • (202) 393-0625

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PETITION FOR RE-HEARING

Comes now the Petitioner, JAMES BRADLEY, by and through his undersigned attorney of record, and pursuant to Rule 58(2) of the United States Supreme Court, files this his Petition for Re-hearing from the Order of this Court dated April 2, 1973, wherein this Court denied Certiorari, and for grounds would state the following intervening circumstances which counsel for Petitioner deems to be substantial or controlling, to-wit:

1. That the response of the State of Florida in erroneously asserting to this Court that Federal claims under the Fourth and Fourteenth Amendments were first raised in the Petition for Certiorari, is in and of itself an intervening circumstance of substantial or controlling effect upon the ripeness of the Federal Constitutional questions which were in fact raised at the trial and State Appellate Court level.

2. The present lack of uniformity in Florida of pre-trial criminal procedural rights which tolerates preliminary hearings in Dade County and denies the same in Volusia County, Florida, by reason of the conflicting decisions in the case of *Pugh v. Rainwater*, 332 F. Supp. 1107, and the case at Bar, constitutes an intervening circumstance of substantial effect upon the Constitutional rights raised by Petition in his Writ of Certiorari.

Respectfully submitted,

DAN R. WARRAN
Post Office Box 2265
Daytona Beach, Florida 32015
Attorney for Petitioner

CERTIFICATE OF GOOD FAITH

Comes now the undersigned, counsel for Petitioner, and certifies that the Petition for Re-hearing is presented in good faith and not for delay; counsel further certifies that the Petition for re-hearing is restricted to the grounds above specified.

DAN R. WARREN
Post Office Box 2265
Daytona Beach, Florida 32015
Attorney for Petitioner